

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP778
2013AP779
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2012TP6
2012TP7**

**IN COURT OF APPEALS
DISTRICT IV**

APPEAL NO. 2013AP778

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO JOSHUA
L. T., A PERSON UNDER THE AGE OF 18:**

PATRICK J. T.,

PETITIONER-RESPONDENT,

V.

SHELLY S.,

RESPONDENT-APPELLANT.

APPEAL NO. 2013AP779

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO MICHAEELE
K. T., A PERSON UNDER THE AGE OF 18:**

PATRICK J. T.,

PETITIONER-RESPONDENT,

V.

SHELLY S.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Jefferson County:
JENNIFER L. WESTON, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ Shelly S. appeals orders terminating her parental rights to Michaellee K. T. and Joshua L. T. Shelly argues that the evidence presented at the fact-finding hearing was insufficient to establish that she was an unfit parent for failing to assume parental responsibility under WIS. STAT. § 48.415(6). For the reasons stated below, the orders are affirmed.

BACKGROUND

¶2 Patrick J. T. petitioned for the termination of Shelly's parental rights to their children, Michaellee and Joshua, on September 13, 2012. As grounds for termination, Patrick alleged that Shelly failed to assume parental responsibility under WIS. STAT. § 48.415(6). Shelly waived her right to have the fact-finding hearing tried to a jury, and the issue of whether grounds for termination existed by clear and convincing evidence was tried to the court.

¶3 Shelly and Patrick were the only witnesses at the fact-finding hearing. After hearing the evidence, the court found that Shelly had failed to

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

assume parental responsibility and thus was an unfit parent. After the dispositional hearing, the court found that termination of Shelly's parental rights was in the children's best interests. Shelly now appeals.

¶4 The following facts are based on the evidence presented at the fact-finding hearing. Shelly and Patrick are the biological parents of Michaellee and Joshua. Michaellee was born on September 6, 2000, and Joshua was born on July 5, 2002. Shelly and Patrick married on September 28, 2001, separated about two months later, and divorced on September 26, 2002.

¶5 During the period of separation prior to divorce, Shelly testified that she had "basically full placement" of the children. The parties' judgment of divorce, which incorporated their marital settlement agreement, granted them joint legal custody (with Patrick having "impasse breaking authority" on issues for which the parties were unable to agree) and shared physical placement. Shelly had placement of the children on weekdays from 5:00 a.m. to 3:00 p.m. and on alternate weekends.

¶6 The parties followed the placement schedule from 2002 to 2007. In February 2007, Shelly informed Patrick that she wanted to change their custody and placement arrangement. On February 16, 2007, Shelly and Patrick stipulated to Patrick having sole legal custody and primary physical placement and to Shelly having periods of physical placement "at times and places as mutually agreed upon by the parties." The court granted the stipulation and order, which remained in effect at the time that Patrick filed the termination petitions.

¶7 Shelly testified that she intended for the change to be temporary, she needed to get help for her mental health issues, she thought the children would be better off not seeing her during that time, and she wanted them to start seeing her

again when she “got the proper help [she] needed.” Shelly was diagnosed with depression, anxiety, and post-traumatic stress disorder, and subsequently took medication for depression and anxiety.

¶8 Patrick testified that he agreed that Shelly’s decision in February 2007 to change the children’s placement was based on her mental health status. He also testified that Shelly had called him and said that she “no longer wanted the children and that [he] could have them full-time.” Patrick testified that he believed the change in custody and placement would be permanent.

¶9 From 2007 to 2012, Patrick maintained a journal documenting Shelly’s contacts with Patrick, Michaellee, and Joshua. The journal entries, which Patrick wrote simultaneously or immediately after an event occurred, indicated the following: during the remainder of 2007, Shelly had a visit scheduled for September 8 but cancelled five minutes before the scheduled pick-up, called Patrick eight times on November 9, and had one visit with the children on December 1; in 2008, Shelly had four visits, spoke on the phone with the children three times, and made five phone calls to Patrick about the children; in 2009, Shelly had four visits with the children and made seven phone calls to Patrick about the children; in 2010, Shelly had two visits with the children, spoke on the phone with the children once, made six phone calls to Patrick about the children, and sent a police detective to Patrick’s house accusing Patrick of impermissibly withholding the children from her, but the detective left upon viewing the custody and placement order; and in 2011, Shelly had one visit with the children and made two phone calls to Patrick about the children.

¶10 Patrick’s journal entries for 2012 reflected that Shelly made seven phone calls to Patrick about the children and had one half-hour visit when she

appeared unannounced at Patrick's home while Patrick and the children were outside. Also in 2012, Shelly made three more unannounced appearances: at Patrick's workplace on March 19; at Patrick's home while Patrick, his wife, and the children were eating dinner on August 17; and at Patrick's home with only the children present on August 28. In response to Shelly's unannounced appearance on August 28, the children called Patrick's wife, who called Patrick to come home. According to Patrick's testimony, the children were scared by the incident and hid in their bedrooms. After this incident, Patrick obtained a four-year harassment injunction against Shelly.

¶11 Shelly testified that the journal was "[n]ot even close" to accurate, and that she "asked to see the children all the time." She testified that she tried to contact the children daily, but did not offer records or documentation of such attempts. Patrick testified that he did not always respond to Shelly's messages asking to see the children, that sometimes when she called and asked to see the children they would be out of state, or that other times, "[he] just forget[s]."

¶12 Shelly testified that she had addressed her mental health issues and was feeling better by 2008 or 2009 after receiving medical treatment. However, according to Shelly, Patrick interfered with her ability to have contact with the children, resulting in sporadic contact with them since 2008 or 2009 when her mental health improved. Shelly did not pursue a modification in the custody and placement order, because she was unable to afford an attorney or secure a volunteer attorney. Moreover, during examination by the guardian ad litem at the fact-finding hearing, Shelly testified as follows:

Q. And when you say you didn't want to go through "that stuff again," what does that mean? What did you mean by that?

A. The humiliation. Him having all this control over me. I constantly felt like when I went through court, they treated me like I was incompetent because of that fact that I do have – I do suffer from anxiety.

Q. Okay. So if I understand correctly, you sort of evaluated the situation and said, “I’m not getting anywhere with [Patrick], but I don’t – I really don’t want to go back to court to deal with this stuff again in a court setting,” like we’re doing today, right?

A. Right. I didn’t really want to.

Shelly did move to modify legal custody and physical placement on September 29, 2012, after Patrick filed his petitions to terminate her parental rights, but a hearing on Shelly’s motion was stayed due to the proceedings pending in this case.

¶13 Shelly has not attended any of the children’s parent-teacher conferences, sporting events, or activities since 2007. Shelly testified that she has not attended these events because she does not know about them. While Shelly has given birthday gifts to Michaellee on three occasions and to Joshua on four occasions, she has not paid for medical bills, school lunches, haircuts, or clothing, or offered to pay Patrick to assist with such expenses.

¶14 After hearing the evidence, the circuit court made the following factual findings: while Shelly did have a relationship with her children from birth until February 2007, she “failed to protect that relationship or nurture that relationship”; mental health issues were the basis for Shelly “turning over” custody and placement to Patrick; Patrick kept good records of Shelly’s contacts and so his testimony as to the events between 2007 and 2012 was “more reliable”; Shelly did not take any steps in family court to resume placement with the children and had minimal contact with her children between 2007 and 2012; the last five-and-one-half years were significant developmental time periods for the children, a time in which Shelly was not involved in their education, medical care, or daily

physical and financial support; and Shelly had an obligation to “get back into family court” once she realized Patrick would not mutually agree on a new placement schedule. For these reasons, the court concluded that Shelly “has not had a substantial parental relationship with these children” and, because she has “removed [herself] for so many years from these children’s lives,” that Shelly had failed to assume parental responsibility by clear and convincing evidence and was an unfit parent.

DISCUSSION

¶15 On appeal, Shelly argues that the evidence presented at the fact-finding hearing was insufficient to establish that she was an unfit parent for failing to assume parental responsibility under WIS. STAT. § 48.415(6).² At the fact-finding hearing, the petitioner must prove the grounds for termination by clear and convincing evidence and “the court or jury shall determine whether grounds exist for the termination of parental rights.” WIS. STAT. §§ 48.31(1), 48.415. “The court or jury shall make findings of fact and the court shall make conclusions of law relating to the allegations of [the] petition” WIS. STAT. § 48.31(4). Here, Shelly did not demand a jury trial, and the court functioned as the fact-finder pursuant to § 48.31(4).

¶16 “In reviewing findings made by a trial court in a trial to the court, ‘[i]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact’ because the trial court has a superior opportunity ‘to observe the

² Shelly does not challenge the court’s determination at the dispositional hearing that the termination was in the best interests of the children.

demeanor of witnesses and to gauge the persuasiveness of their testimony.’” *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169 (quoted source omitted). The trial court, not the appellate court, resolves conflicts in the testimony, and we review the evidence in the light most favorable to the findings made by the trial court. *Id.*

¶17 In order to establish grounds for termination of parental rights for failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6), the petitioner must show that the person whose rights are being terminated has “not had a substantial parental relationship with the child.” WIS. STAT. § 48.415(6)(a). “[S]ubstantial parental relationship” is defined by statute as “the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child.” WIS. STAT. § 48.415(6)(b). The relevant statute further provides:

In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child, and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶18 In *Tammy W-G. v. Jacob T.*, the Wisconsin Supreme Court explained that “a fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility.” 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854. Specifically, “a fact-finder should consider a parent’s actions throughout the entirety of the child’s life when determining whether [s]he has assumed parental responsibility.” *Id.*, ¶23. Although a parent’s lack of opportunity to establish a substantial relationship is not a defense, “the

fact-finder can and should consider the reasons why a parent has not supported or cared for her child” under the totality-of-the-circumstances analysis. *Id.*, ¶¶32, 38.

¶19 Shelly argues that because she had a substantial parental relationship with Michaellee for the first six years and five months of her life and with Joshua for the first four years and seven months of his life, she assumed parental responsibility for the children within the meaning of WIS. STAT. § 48.415(6). However, the court in *Tammy W-G.* foreclosed this argument, holding that when amending the language to WIS. STAT. § 48.415(6), “the legislature refused to require a fact-finder to consider a specified time period” but instead, “kept the relevant time period broad, allowing the fact-finder to consider the child’s entire life and decide if, based on all the facts, a parent has assumed parental responsibility for his or her child.” 333 Wis. 2d 273, ¶27. Moreover, the court in *Tammy W-G.* noted that the words “‘significant’ and ‘daily’” in the statute “do not indicate that the assumption of parental responsibility is established when the parent has cared for the child for only a short portion of the child’s life.” *Id.*, ¶25.

¶20 While it is true that Shelly had a substantial parental relationship with Michaellee and Joshua during the approximate first half of their lives, Shelly’s argument ignores the second half of the children’s lives, during which, based on the evidence at the fact-finding hearing, Shelly had sporadic contact and failed to accept and exercise significant responsibility for the daily supervision, education, protection, and care of the children. Under *Tammy W-G.*, the court properly considered Shelly’s relationship with the children throughout their *entire* lives and concluded, under the totality of the circumstances, that Shelly had not had a substantial parental relationship with them. *See Tammy W-G.*, 333 Wis. 2d 273, ¶¶22-23.

¶21 In making this determination, the circuit court examined many factors. Under the totality-of-the-circumstances analysis, the circuit court considered the reason why Shelly had not supported or cared for her children initially, namely, her mental health condition, and that Shelly had the ability and opportunity to reestablish a parental relationship with the children as early as 2008, when her mental health condition improved. The court also properly considered that Shelly made no attempt to utilize the court, through a request for mediation or filing of a motion, to reestablish contact with the children once she felt that her mental health recovered. Shelly did not produce any evidence at trial to establish or prove her allegation that she attempted to contact the children more frequently than was outlined in Patrick's journal, and the circuit court found Patrick's testimony to be more reliable. Finally, the court also properly considered that from 2007 to 2012, Shelly had not been involved in nor taken responsibility for the daily supervision, education, protection, and care of the children, as demonstrated by her lack of involvement in the children's education and care, and her lack of financial support. In sum, under *Tammy W-G.*, the evidence presented at the fact-finding hearing was sufficient to support the court's determination that Shelly was an unfit parent in failing to assume parental responsibility for her children.

CONCLUSION

¶22 For the reasons stated, the orders terminating Shelly S.'s parental rights to Michael K. T. and Joshua L. T. are affirmed.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

